Mail Contractors of America *and* Des Moines Area Local, American Postal Workers Union, AFL–CIO. Case 18–CA–17636

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On January 26, 2006, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, except as modified below, and to adopt the recommended Order.

In his written decision, the judge issued a Notice of Potential Admonishment, Reprimand or Summary Exclusion (Notice) to Respondent's attorney, Jeffrey Pagano. Citing Section 102.177(b) of the Board's Rules and Regulations,[3] the judge determined that the combined effect of various actions by Pagano at the hearing constituted misconduct which, if repeated in subsequent Board proceedings, would subject Pagano to possible admonishment, reprimand, or summary exclusion from a Board hearing in those proceedings.[4] In issuing this Notice, the judge stated that he did not construe Section 102.77(b) to require that the admonishment, reprimand, or notice be issued during the hearing. Rather he believed that those actions could be taken at any stage "during the proceeding."

The Respondent excepts, arguing that the Board should vacate the Notice. The Respondent contends that Section 102.177 applies only where there has been serious and substantial misconduct, which, according to the Respondent, is not shown here. The Respondent further asserts that, even where there is serious and substantial misconduct, "due notice" is required, which the judge acknowledged that he did not provide to Pagano prior to his decision. The Respondent also contends that although the judge terms his action as a "Notice of *Potential* Admonishment, Reprimand or Summary Exclusion" (emphasis added), its publication in the reported judge's decision amounts to a sanction which will irreparably injure Pagano unless the Board vacates the Notice. The Respondent further asserts that, pursuant to Section 102.177(d) of the Board's Rules and Regulations, the alleged misconduct should be referred to the Associate General Counsel, Division of Operations Management for investigation.[5] Finally, the Respondent contends that

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the driver-relay point without first giving the Union an opportunity to bargain over the change and its effects, Members Liebman and Walsh rely, as did the judge, on *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997). Members Liebman and Walsh observe that here, as in *McClatchy*, the unilateral change had a direct effect on wages.

Chairman Battista, in adopting the 8(a)(5) and (1) finding, relies solely on past practice in finding that the Respondent was not privileged to unilaterally change the driver-relay point. In this regard, Chairman Battista notes that, in both the prior management-rights clause and in the newly implemented one, the Respondent had the right to determine "relay points." Notwithstanding this provision, the past practice under the prior contract was to give the Union 30 days advance notice and an opportunity to discuss a respondent-initiated change in relay points. There is no evidence that a change in this past practice was contemplated by the newly implemented management-rights clause. Thus, the Respondent's change here, without notice and opportunity to bargain, was unlawful under Sec. 8(a)(5).

[3] Sec. 102.177(b) states:

> Misconduct by any person at any hearing before an administrative law judge, hearing officer, or the Board shall be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (e) of this section for handling allegations of misconduct, the administrative law judge, hearing officer, or Board shall also have the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.

[4] According to the judge, Pagano spoke loudly, made exaggerated gestures, questioned a witness in an intimidating manner by standing too close to him, made inappropriate remarks, showed disdain for a ruling by laughing, made inappropriate responses to objections, ignored instructions not to address witnesses by their first names, misstated that the collective-bargaining representative was the International (not the Union), ignored instructions that only one counsel per witness make objections, repeatedly asked questions covering previous rulings, prolonged the proceedings so that he needed to be prompted to continue his examination of witnesses, and continued to argue after rulings were made on routine matters.

[5] Sec. 102.177(d) provides:

> Misconduct by an attorney at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, shall be grounds for discipline. Such misconduct of an aggravated character shall be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

the judge demonstrated hostility and bias toward Pagano and, therefore, the decision should be reversed or, at the least, the case should be remanded for a de novo hearing before another judge.

We find merit, in part, to the Respondent's exceptions. We agree with the Respondent that the Notice constitutes, at a minimum, an admonishment under Section 102.177(b) of the Board's Rules and Regulations. The judge enumerated specific conduct by Pagano that he found to be inappropriate, and concluded that "[v]iewed in its entirety Pagano's conduct was not of professional level expected in appearances before a court."[6] The judge also cautioned that a repetition or continuation of this conduct could result in an admonishment, a reprimand, or summary exclusion from a hearing.

Although the judge may have believed that he was only giving notice of potential discipline, we find that he was in fact imposing discipline in the form of a public admonishment or reprimand. The Notice criticizes Pagano publicly and in writing with respect to his professionalism, which could have a negative effect on Pagano's legal reputation. The Notice also purports to serve as the basis for future discipline against Pagano, and thus to affect the nature of any future sanctions that the Board may impose for repeated misconduct.[7] Therefore, contrary to our dissenting colleague, our conclusion that Pagano was admonished is not based solely on the specificity of the judge's recitation of the misconduct. Rather, it is based on: (1) the judge's finding that Pagano engaged in misconduct; and (2) the fact that the public announcement of this finding of misconduct may result in negative professional consequences for Pagano, and potentially serve to increase the sanction for any future misconduct. Unlike our colleague, we find that Pagano is entitled to due notice before the judge may take action that will result in such consequences.

Our dissenting colleague says that we have placed the judge on the horns of a dilemma. If he is too specific in his recitation of the conduct, the Board will consider this to be the imposition of discipline (an admonishment) without prior notice. If the judge is not specific, the Board will say that there is inadequate notice of potential discipline. The answer is that there is no dilemma. Where, as here, misconduct is found and discipline imposed (e.g., an admonishment), the judge should give due notice prior to the imposition of the discipline. Similarly, if the judge is considering the imposition of discipline in the future, due notice must be given. In both instances specificity is required.

We do not decide whether the admonishment or reprimand must be meted out, in all instances, during the hearing. Nor do we disagree with the dissent about the usual deference that should be accorded a judge in the exercise of discretion. However, that discretion must be exercised within the Rules. The judge's action here was taken without the due notice required by the Rules. In the particular circumstances of this case, we find that Pagano was not provided with adequate due notice. We reach this conclusion for the following reason. At no time prior to the judge's decision was Pagano put on notice that his acts, singularly or cumulatively, could subject him to 102.177(b) sanctions.[8] In these circumstances, Pagano had neither the opportunity to contest the judge's assertions nor to modify his (Pagano's) behavior. Based on these circumstances, we find that Pagano was not afforded adequate due notice and, accordingly, that the judge's Notice of Potential Admonishment should be struck.[9]

Our colleague would permit the judge to issue his "Notice" in the decision. However, as discussed above, the "Notice" was itself an admonishment. Under our Rules, we require opportunity to protest the admonishment *before it occurs*.

We find no merit, however, to the Respondent's allegations of bias and hostility on the part of the judge. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias or hostility in his credibility resolutions, analysis, or discussion of the evidence. We therefore deny the Respondent's request to reverse the

See also Sec. 102.177(e)(1) which states:

> Allegations that an attorney or party representative has engaged in misconduct [under Sec. 102.177(d)] may be brought to the attention of the Investigating Officer by any person. The Investigating Officer, for purposes of this paragraph, shall be the Associate General Counsel, Division of Operations-Management, or his/her designee.

[6] We are not passing on the correctness of the judge's findings or his characterization of Pagano's conduct.

[7] We note that, in a typical Board case, a warning by an employer that lays "a foundation for future disciplinary action against [the employee]" is also considered to be a disciplinary action. See, e.g., *Promedica Health Systems*, 343 NLRB No. 131 (2004), quoting *Trover Clinic*, 280 NLRB 6, 16 (1986). We also note that the term "admonish" means "to express a warning" *Webster New Collegiate Dictionary* (1977).

[8] The only instances during the hearing in which the judge arguably alerted the Respondent's counsel that he was engaging in a pattern of misconduct were when he stated to counsel, "Mr. Pagano, last time you will interrupt me," and when the judge advised counsel on another occasion that his chuckling was inappropriate. The judge's first statement occurred fairly early in the 2-day hearing and the latter virtually at the end of the hearing, and neither statement was repeated.

[9] However, because the judge, in his analysis, also relied on Sec. 102.177(d) and (e) of the Board's Rules and Regulations, we leave to the judge the issue of whether he wishes to refer Pagano's alleged misconduct to the Associate General Counsel for investigation pursuant to those provisions.

judge's decision or, alternatively, to remand this case for a de novo hearing before another judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mail Contractors of America, Des Moines, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

The Board also orders that the notice regarding admonishment be stricken.

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I would find that the judge acted within his discretion in issuing the Notice of Potential Admonishment, Reprimand, or Summary Exclusion (Notice) to the Respondent's attorney, Jeffrey Pagano. Accordingly, I dissent from the majority's decision to vacate the Notice.

In issuing the Notice, the judge relied on Section 102.177(b) of the Board's Rules and Regulations, set forth in the majority opinion. That rule requires an administrative law judge to give "due notice" to an individual of any admonishment, reprimand, or summary exclusion before taking that action against the individual. In the present case, the judge has not admonished, reprimanded, or excluded anyone: the discussion in the judge's decision merely provided the predisciplinary "notice" required by the Board's Rules. Stated otherwise, the judge has simply chosen to give Pagano the required notice in the body of his decision, instead of at the hearing.

My colleagues believe, at least on the facts of this case, that the notice of admonishment is improper because it was issued after the hearing closed. I disagree. Although, as my colleagues state, it would perhaps have been more effective to issue the notice during the hearing, when Pagano could have altered his behavior, the rule does not require it.[1]

Misconduct in the courtroom is a serious matter, and judges must have the authority to control the conduct of the attorneys who appear before them. In my view, a judge should be free to reconsider that conduct, or to consider it as a whole, after the hearing has closed, and to take such action as is warranted. Absent an abuse of discretion, I would not second guess a judge's decision to issue a notice of potential admonishment.

Finally, because the judge has not actually admonished Pagano, I see no due process issue here. I recognize that Pagano may be affected by the appearance of the Notice in the judge's decision. Indeed, that was the judge's point, to put Pagano on notice and lay the required foundation for future discipline, if appropriate. However, the fact that a notice may have potential consequences does not turn it into an admonishment. The notices required by the Board's Rules before discipline may ensue are not themselves discipline; they are merely notices, even if, as claimed by the majority, they may lead to future sanctions or negative professional consequences. Because there has not yet been any actual discipline in this case, Pagano's due process rights have not been violated. He has merely received the notice required by the Board's Rules before any action can be taken against him.

For these reasons, I would affirm the judge's issuance of the Notice.

Dated, Washington, D.C. August 31, 2006

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

[1] The majority contends that the judge's notice was actually an admonishment, because of the judge's purported finding that Pagano engaged in misconduct, as well as the fact that the public announcement of the Notice may result in negative professional consequences for Pagano and may potentially increase the sanction for future misconduct. Although the majority expressly denies that it bases its conclusion on the specificity with which the judge described Pagano's alleged misbehavior, its decision suggests otherwise. And that is problematic, because, had the judge failed to detail what concerned him, Pagano could reasonably have claimed that he was not given due notice of his alleged misconduct. The other factor apparently relied upon by the majority—the judge's statement that "Pagano's conduct was not of [a] professional level expected in appearances before a court"—raises a similar problem. Under the Board's Rules, an admonishment must be preceded by notice. But a notice would not be a notice unless it both indicated what about the person's conduct the judge found troubling and warned of consequences. Applying the majority's reasoning, a judge who said too little would violate a person's due process rights, while a judge who said too much would be deemed to have issued an admonishment without prior notice. I would not require our judges to thread that needle.

Kristyn A. Myers and *Marlin O. Osthus, Esqs.,* for the General Counsel.
Jeffrey W. Pagano and *Herbert I. Meyer, Esqs. (King, Pagano, & Harrison),* of New York, New York, for the Respondent.
Josephine A. Escalante, Esq. (O'Donnell, Schwartz & Anderson, P.C.), of Washington, D.C., for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Des Moines, Iowa, on September 27 and November 30, 2005. The charge was filed by the Des Moines Local, American Postal Workers Union, AFL–CIO (the Union) on April 18, 2005[1] and the complaint was issued July 18. The complaint, as amended at the hearing, alleges that Mail Contractors of America, Inc. (Respondent) violated Section 8(a)(5) and (1) by unilaterally changing a driver relay point from York, Nebraska, to Havelock, Nebraska. Respondent filed a timely answer that, as amended at the hearing, admits jurisdiction, labor organization status, unit, and the Union's 9(a) status; it denied the substantive allegations of the complaint. The answer alleged several affirmative defenses, including that the Union waived any right it had to bargain concerning the change in relay points, that such waiver survived the expiration of the most recent collective-bargaining agreement, that changing relay points was an existing term and condition of employment and was the status quo, and that the change in relay points was done in accordance with past practice.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with headquarters in Little Rock, Arkansas, is engaged in the interstate and intrastate transportation of bulk mail for the United States Postal Service. Respondent annually receives gross revenues in excess of $50,000 from its interstate operations. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated, Respondent transports bulk mail for the USPS throughout the United States. In the last 3–4 years it has also diversified into nonmail dedicated contract carriage markets. Respondent has about 1600 employees of whom about 1300 are drivers and it operates about 900 tractors and about 1500 trailers. It has about 16 terminals nationwide including one in Urbandale, Iowa, where it operates 14–18 runs each day. It uses a number of relay points outside the Urbandale area. These relay points are locations where the truck is turned over to another driver for completion of the run. The new driver reports directly to the relay point and the old driver goes off duty directly from the relay point.

Respondent has recognized the Union as the collective bargaining representative for the following unit of employees:

> All full-time bid and extra board drivers and regular casual drivers employed by Respondent who report to its Urbandale, Iowa, Regional Terminal Manager, but excluding all office clerical employees, mechanics, seasonal drivers, guards and supervisors as defined in the Act, as amended, and all other employees.

There are about 90 employees in the bargaining unit, about 30 of whom located near the Urbandale location; the remainder are domiciled at locations such as Oakwood, Illinois; Cedar Rapids, Iowa; North Platte, Nebraska; and Caldwell, Idaho.

David R. Bachman is Respondent's general counsel and senior vice president. Darrell Bickel is Respondent's operations manager for the Urbandale, Iowa facility.

B. Expired Contract and Past Practice

The most recent collective bargaining agreement expired September 30, 2003. Negotiations took place on a coordinated basis involving other represented units but no collective-bargaining agreement was reached. About a year after the contract expired Respondent implemented its final offer. The General Counsel does not contend that the implementation of the final offer was unlawful. A strike followed that lasted from March 21 to April 11.

The expired contract had a management-rights clause that stated:

> The employer expressly retains all management rights and functions traditionally held by management. It is understood that such management rights include, but are not confined or limited to the following: the right to direct its working force, including the assignment and reassignment of drivers to routes; the arrangement and rearrangement of routes; . . . the right to determine driver domiciles and driver relay points; . . . to decide the location of its terminal(s) and relay points. . . .

The expired contract also provided that on about July 1 each year all regularly scheduled runs be posted for bid and awarded according to seniority. New jobs and vacancies that occurred during the bid year also had to be posted for bid and awarded by seniority; drivers could bump in accordance with seniority if their runs were abolished.

Under the expired contract Respondent changed runs, including relay points. When it did so the Union was informed generally 30 days in advance. The Union then met with management and discussed the effects of the change before the change was effectuated; they agreed to allow new bidding or bumping if the change to the run was significant.[2] However, the new relay points selected by Respondent were never changed as a

[1] All dates are in 2005, unless otherwise indicated.

[2] Respondent concedes in its brief that Respondent "evidently did previously bargain with the Des Moines local over the 'effects' of the restructuring that resulted from less than a complete abolishment of a run."

result of these discussions. The record shows about six instances where the relay points were changed in the manner described above; all but one were changes in relay points required by either USPS or changes in DOT regulations. In the single instance involving a discretionary change in relay points it was the Union who suggested the change and Respondent agreed.

The parties reached tentative agreement during bargaining on a number of issues despite being unable to reach a complete agreement. One such tentative agreement was a modification of the bidding provisions in the expired contract. Among the changes in the bidding process was a provision that allowed drivers to bump into other runs, according to seniority, if their compensation was reduced by more than 15 percent due to a change in their bid assignments. As mentioned above, under the expired contract bumping was allowed as a matter of right only if the run was abolished. The Union had sought the new provision in negotiation and the parties tentatively agree to it in exchange for revisions in a new management-rights provision that granted Respondent increased power to act unilaterally. The new tentative management-rights language provided that Respondent had the right to "determine and establish the location of its domiciles, terminals and relay points" and "arrange, rearrange, and/or restructure bids/routes."

Pursuant to the implemented final offer the annual bidding process began January 28 and ended February 28, by which time the drivers were switched to their bids.

C. Relay Point Change

One of the delivery routes that Respondent regularly makes is from its terminal to Denver, Colorado, and back. Five different drivers work portions of this route. The relay point for that route had been at a truck stop near York, Nebraska. After the strike began, a driver on this run left his truck at a United States Postal Service facility in Omaha, Nebraska, and joined the strike. Respondent asked a nonstriking driver who lived in Havelock to pick up the truck and drive it to York, and she did so. Respondent then changed the relay point from York to a parking lot at a convenience store in Havelock, Nebraska, which is within the Lincoln, Nebraska, metropolitan area. As Darrell Bickel, Respondent's operations manager, explained he changed the relay point because he had "resources there [in Havelock] and I wanted to cover my runs with the resources I had." He explained that he did not move the relay point back to York after the strike because he learned during the strike that it was better to leave the relay point at Havelock because he had resources there, such as trailers and drivers, and so he could better deal with emergency situations such as truck breakdowns and drivers calling in sick. Havelock is located about 50–60 miles east of York. This change shortened the travel time and compensation by about 2 hours round trip for drivers heading east while it lengthened the trip and compensation by about the same amount for drivers heading west. Bickel admitted that he did not notify the Union of the change in the relay point at the time he made it because he "was just too busy trying to keep things running at that point in time" because of the strike.

Marion Vanis worked as a driver for Respondent from 1990 to July 8, 2005. He drove a portion of the Denver route, picking up the truck at York before the relay point was changed. Vanis lived about 40 miles from the York relay point and about 60 miles from the Havelock relay point. While York was the relay point he worked Vanis made four runs and worked 40 hours per week. After the change he started work about an hour later and arrived back about an hour earlier, so his hours were reduced.

Daniel Wild has worked as a driver for Respondent for over 10 years. He also drove the Denver route. After the strike Bickel told him of the relay point change and put out a new bid sheet with the revised times for the run that resulted from the change in the new relay point. He worked between 38 and 56 hours per week, depending on whether he did two or three runs that week. The Havelock relay point is about 45 miles from his house. After the change to Havelock the time spent making the run to Denver lengthened about 2 hours. He works about 40 hours per week performing back-to-back runs. His breaktimes decreased from three 15-minute breaks to one 20-minute break. In addition, after the change Wild has less breaktime between runs when he does back-to-back runs.

Robert Lee Gray is a truckdriver for Respondent; he also serves as craft director and steward for the Union. Sometime during the strike Gray heard from other employees that Respondent's trucks were no longer coming into York; the Union believed Respondent made the change in an effort to avoid picketing. After the Union made an unconditional offer to return to work and end the strike on about April 11, certain union officials, including Gray, met with Darrell Bickel, Respondent's operations manager, to discuss the orderly return to work. During the course of conversations that day or the next Bickel advised the Union that the York relay point had been moved to Havelock. Gray asked why that had been done, and Bickel answered "management rights." Gray then said that he thought Bickel had to negotiate for the change; Bickel reiterated that it was management's right and that it was a done deal. A few days later the Union again met with Bickel to discuss issues arising from the return to work. Gray raised the issue of the relay change. Gray said the relay point should be put back to York and the company needed to negotiate over the matter. Bickel again replied that it was management rights and that it was a closed subject. The route was not rebid after the strike ended.

The factual findings in the preceding paragraph required the resolution of two significant issues of credibility; I explain now the basis for resolving those issues. The first dispute is whether Gray requested Bickel to bargain about the change in the relay point during meetings shortly after the strike ended. The General Counsel argues that I should credit Gray's testimony while Respondent argues that I should discredit Gray and should instead credit Bickel's testimony. Although as described below I do not credit Gray's testimony in its entirety, I do on this point. On this point his demeanor was convincing and his testimony consistent. I have considered Bickel's testimony that after he told Gray of the change in relay points Gray said, "[T]hat he didn't believe I had the right to do that. We came to a mutual agreement that we wasn't [sic] going to agree on the matter. That I believed I had the right and he believed I didn't. And (Gray) said that he'd be filing a grievance on it." Bickel spe-

cifically denied that Gray made any proposals or requested bargaining on the matter. I note that Bickel's testimony was more conclusory in nature than Gray's. This is significant because Bickel admitted that Gray argued that Bickel did not have the right to change the relay point but Bickel did not testify as to the reason that Gray gave to support his contention. I conclude it likely that Gray did provide an argument as to why he contended that Respondent could not make the change, and the reason he gave was that Respondent had to bargain first with the Union. In addition, on this point Bickel's demeanor appeared unconvincing. The second issue of credibility concerns whether Bickel agreed to rebid the route after the strike and then did so. Respondent again argues that I should discredit Gray and credit Bickel. On this point I credit Bickel's testimony. I have considered Gray's testimony that during the meetings Bickel agreed to rebid the route and that Bickel then did so. But Gray's testimony concerning the rebidding of routes was contradictory and his demeanor uncertain. While I acknowledge that driver Daniel Wild corroborated Gray's testimony that the route was rebid, another driver called as a witness by the General Counsel, Marion Vanis, testified that route was not rebid. Bickel explained that there was no discussion about the need to rebid the run after the change because according to the implemented final offer the change did not trigger the new 15-percent rule explained above. This strikes me as entirely plausible. Bickel demeanor while testifying that the route was not rebid after the strike was convincing.

III. ANALYSIS

I first resolve a procedural matter. Respondent argues that I should not base my decision on the entire record. Instead, it argues that I erred when I denied its motion to dismiss at the conclusion of the General Counsel's case. Respondent based its motion to dismiss entirely on the statement of position it provided during the investigation of the charges in this case. The content of such letters is, of course, hearsay if offered generally for the truth of the matter asserted. However, the General Counsel initially offered the letter, and it was received into evidence over Respondent's objection, as an admission of a party opponent. Because the letter was offered against Respondent the letter was no longer hearsay. Section 801(d)(2) of the Federal Rules of Evidence. Later in the hearing Respondent asked the General Counsel whether she had offered the letter for the truth of the matter asserted and she answered yes. Respondent's counsel agreed to its admission on that basis. I clarified that the General Counsel was no longer seeking the letter's introduction for the limited extent to which it contained admissions against Respondent's interests. I ruled that the letter was then admitted into evidence for the truth of the matter asserted. From this Respondent argues in its brief:

> Thus, as a matter of law, every statement of fact set forth in the Statement of Position, and arguably every argument and conclusion as well, are conclusively established, and must be found to be so by the ALJ. . . .

But Respondent confuses the admission of this document with a stipulation of fact. The parties did not stipulate to the facts contained in the letter, nor did I receive it as a stipulation of fact. It is therefore one piece of evidence, to be considered along with the entire record, in resolving the issues in this case.

An employer violates the Act when it unilaterally changes working conditions of employees represented by a labor organization. *NLRB v. Katz*, 369 U.S. 736 (1962). The routes and relay points set by an employer for its drivers are working conditions that may not be changed without first giving the collective-bargaining representative of those drivers notice of the change and an opportunity to bargain. *Southern Mail, Inc.*, 345 NLRB No. 43 (2005). Respondent admits that it changed the relay point without first giving the Union the requisite notice.[3] Unless there is a legal justification for the unilateral change a violation of the Act seems apparent.

Citing cases such as *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001), and cases cited therein, Respondent correctly points out that a change must be a material, substantial, and significant change that has a real impact on the employees or their conditions before a violation is found. It argues the change in relay points did not have a real impact on the employees or their working conditions. I disagree. The change in relay point directly reduced the compensation for some workers and increased it for others. As Respondent itself points out in its brief "there is no more vital term and condition of employment than one's wages" citing *American Tissue Corp.*, 336 NLRB 435, 444 (2001). Also, the change directly affected the amount of time the workers had to work each day and directly affected their starting and quitting times. Finally, breaktimes and the amount of break time were also directly affected.

Under the terms of the expired contract Respondent had persuaded the Union to waive its right to bargain concerning the relay points, but that waiver expired with the expiration of the contract, absent evidence that the parties intended that the waiver extend beyond the contract's expiration. *Ironton Publications*, 312 NLRB 1048 (1996).[4] There is no evidence whatsoever that during bargaining for the expired contract the parties had intended that any waiver, much less that waiver of the Union's right to bargain over the location of relay points, would survive the contract term. Respondent argues that the Union's waiver was "reestablished" because Respondent and the Union had tentatively agreed to a management-rights provision that included the waiver and a separate new bumping procedure, described in more detail above. Respondent argues:

> By entering into this quid pro quo agreement and the lawful implementation of the provisions of the agreement, the Union waived any right to bargain regarding the restructuring of routes by MCA, relieving MCA of any duty to bargain with

[3] Respondent admits "it did so unilaterally, i.e., without first notifying the [Union] of the change and affording the [Union] the opportunity to bargain over the change."

[4] In its brief, Respondent writes that I ruled "that to establish that the Union's waiver regarding a change in the relay points continued post-expiration of the CBA, MCA had to provide 'direct evidence' that the waiver was intended to continue after the expiration of the CBA." It cites pp. 87–79 of the transcript. Not only did I not make such a ruling, the transcript is devoid of the quoted words attributed to me by Respondent.

> the Union over the change in relay point from York to Havelock on March 23, 2005.

But the fact remains that the Union never finally agreed to those provisions; the tentative agreement was conditioned upon an agreement for an entire collective-bargaining agreement; complete agreement was never reached. Rather than showing that the parties agreed to reestablish the waiver, this evidence shows just the opposite; the waiver would not be given until an overall agreement was reached.

The General Counsel does not contend that the implementation of the final offer, including the management-rights clause, was unlawful. Based on this position Respondent argues that the General Counsel is now precluded from arguing that any waivers contained in that provision may not be relied on by Respondent. While the General Counsel's refusal to allege that the implementation of the final offer was unlawful precludes the Board from finding a violation based on the implementation, it does not preclude the Board from assessing the merits of the arguments made by parties in determining whether other unfair labor practices have occurred. So in this case I independently examine whether the management rights portion of the unilaterally implemented final offer provides a legal justification for Respondent's conduct in this case. I conclude it does not. The Board has directly addressed this point when it stated:

> We affirm the judge's rejection of the Respondent's argument that a management rights clause in the contract proposal that it unilaterally implemented after a bargaining impasses justified subsequent unilateral changes in unit employees' terms and conditions of employment. See *Control Services*, 303 NLRB 481, 484 (1991), enfd. mem. 975 F.2d 1551 (3d Cir. 1992).

Raven Government Services, 331 NLRB 651 fn. 3 (2000). Moreover, while an employer is generally free to implement its final offer made during negotiations after reaching a valid impasse in bargaining, an employer may not compel a union to grant it unlimited discretion on important mandatory subjects of bargaining even after bargaining to overall impasse. *McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997); *KSM Industries*, 336 NLRB 133 (2001). Here, changes in relay points directly affect workers "wages and hours." The specific language of Section 8(d) of the Act requires the parties to bargain over "wages and hours." It would undermine this specific statutory mandate if an employer could relegate to itself the discretion to determine these matters on a continuing basis, even after reaching impasse in bargaining. In addition, to allow an employer to do so unjustifiably affects the balance of power between labor and management and thereby undermines an important goal of the Act of encouraging the parties to reach a collective-bargaining agreement. This is so because, as this case shows, there are occasions when an employer may desire unlimited discretion on a mandatory subject of bargaining and may seek in bargaining to persuade a union to relinquish its right to bargain over the matter. In order to do so a union may seek concessions from the employer on other conditions of employment. But if an employer can relegate to itself this discretion a union's bargaining strength is diminished and the likelihood of reaching an agreement is decreased. Indeed, in some respects this case is stronger on the facts than McClatchy. In that case there were at least some parameters concerning how that employer could affect the employee wages. Here, Respondent seeks to change relay points totally at its discretion. And here the change does not only affect wages, but also starting and quitting time, hours of work, breaktimes, and amount of time for breaks. Certainly the Act, which was enacted for the purpose of "encouraging the practice and procedure of collective bargaining," forbids such a result.

Respondent argues that it was privileged to change the relay point because the change was consistent with a practice that had developed under the expired contract that allowed it unilaterally change relay points. It points to evidence, described above, that it had done so on several occasions before.[5] But this argument fails for several reasons. First, Respondent has failed to show that the past practice included discretionary changes in relay points such as the one that occurred in this case. To the contrary, the evidence shows that except for a single instance the relay point changes made in the past were as a result of changes required by the USPS or government regulations. And the single instance of a discretionary change in relay points did not involve unilateral action by Respondent; it came after the Union suggested the change and the parties discussed it. The difference between discretionary changes and changes required by third parties is a distinction that the Board itself recognizes. *Southern Mail, Inc.*, 345 NLRB No. 43, slip op. at 2, fn. 7, at 5, fn. 18 (2005). Respondent cites *Standard Motor Products*, 331 NLRB 1466 (2000), as support for its argument. In that case, the employer combined certain jobs in its subassembly department. The Board concluded this was lawful because the employer acted consistent with a past practice. *Standard Motor* is therefore inapposite because here I have concluded that Respondent has not acted in a manner consistent with an established past practice. *Long Island Head Start*, 345 NLRB No. 74 (2005). In addition, the practice concerning the change in relay points cannot be viewed in isolation where, as here, that practice was invariably connected with prior notice and discussions. Here, Respondent selected only a portion of the past practice—changing relay points—while refuse to follow the past practice in its entirety. An employer

[5] In its brief, Respondent contends that I erred when I did not allow it to present evidence of past practice at four other facilities. I adhere to my ruling. On the circumstances of this case only evidence of past practice regarding *unit employees* is relevant. *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999). Respondent cites *Dow Jones & Co.*, 318 NLRB 574 (1995). That case involved issues of whether the employer had a corporatewide practice of allowing union meetings on its premises and then whether the employer violated Sec. 8(a)(5) by failing to follow that practice at a specific facility. In that situation of course the practice at other facilities is relevant to show the existence of a corporatewide policy. In our case the issue concerns the practice as it pertains to unit employees, and Respondent has been allowed to fully develop the record in that regard. In a similar vein, Respondent contends that I erred by not allowing it to submit "documentary evidence demonstrating that MCA's right to discharge for cause contained in the Management Rights provision that was unilaterally exercised by MCA based on established past practice." I adhere to my ruling; that evidence would add nothing to assist in the resolution of the issues in this proceeding.

may not cherry-pick only portions of a past practice. Moreover, even if the past practice allowed Respondent to change relays points unilaterally, the practice is not binding on the parties forever. *Mississippi Power Co.*, 332 NLRB 530, 531–532 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002). Either party may seek to change the practice through negotiations. Here, as soon as the Union learned of the change it requested bargaining. At that point Respondent was obligated to bargain about changing the practice and restoring the relay point to York.

Respondent argues that the authority to bargain on behalf of the Union rested with Mark Dimondstein, the Union's chief negotiator during contract negotiations and therefore it was free to ignore Gray's bargaining demand. This argument is without merit. First of all, Bickel did not testify that this was a reason he refused to bargain over with the Union, nor did he voice such an objection when Gray protested the change. Next, this argument puts the cart ahead of the horse; Respondent was required to agree to bargain first and only then does the identity of the negotiator become important. It may well have been that Dimondstein would have been designated by the Union as its bargainer. The record shows that Gray was designated by the Union to participate in the discussions with Bickel concerning the orderly return to work of the strikers and in fact Respondent dealt with Gray and other union officials other than Dimondstein on that matter. This has all the signs of an argument made up after the fact.

Respondent argues that the change in relay points was brought about due to the exigencies arising from the strike and its need to maintain effective operations. This may be true, but it misses the point. Respondent did not make a temporary change in relay points for the course of the strike; it made a permanent change that continued after the strike ended and after the Union had requested to bargain over the matter.

Concerning bargaining over the effects of a change in relay points, I have described above in more detail how the expired contract provided for bumping as a matter of right only when an entire bid was abolished but how the practice developed of giving the Union prior notice of a change of changes in relay points and bargaining then ensued over the effects of that change. Thus, neither the expired contract nor the practice of the parties entitled Respondent to refuse to bargain over the effects of a change in relay points. I have noted above that when Gray asked to bargain over the change in relay points Bickel refused to do so, either over the decision or effects. In defense of its conduct Respondent argues that the Union waived its right to effects bargaining when the Union tentatively agreed to the new language allowing bumping when their compensation was reduced by more than 15 percent due to a change in their bid assignment. I cannot reach such a conclusion because the practice of the parties was to engage in effects bargaining regardless of the circumstances under which the contract provided for bumping as a matter of right. That is, the parties themselves did not view the bumping provisions as covering the totality of effects bargaining when relay points were changed.

By changing the relay point from York to Havelock, Nebraska, without first giving the Union an opportunity to bargain over the change and its effects, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By changing the relay point from York to Havelock, Nebraska, without first giving the Union an opportunity to bargain over the change and its effects, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall require that Respondent restore the relay point on the Denver, Colorado, run to York, Nebraska. I shall order Respondent to make employees whole for the monetary losses they incurred as a result of its unlawful conduct, with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). On this point the General Counsel seeks to include as a remedy the expenses some employees incurred as a result of increased commuting time to the new relay point. I disagree. While commuting time may, under certain circumstances, be a mandatory subject of bargaining, *United Parcel Service*, 336 NLRB 1134, 1135 (2001), in this case I shall do what the Board did in *United Parcel*—order Respondent to bargain over the matter.

Notice of Potential Admonishment, Reprimand or Summary Exclusion

Section 102.177(d) of the Board's Rules and Regulations provides that misconduct by an attorney at a hearing may result in discipline; misconduct of an aggravated nature may result in suspension or disbarment. Section 102.177(e) outlines the exclusive procedures to be used in cases concerning discipline of that nature. *675 West End Owners Corp.*, 345 NLRB No. 27 (2005). Notwithstanding those provisions a judge may admonish or reprimand an attorney for misconduct that occurred in a hearing and misconduct shall also be grounds for summary exclusion from a hearing. Section 102.177(b); 675, id. That section, however, requires that the admonishment or reprimand occur only "after due notice." This shall constitute notice to Jeffrey W. Pagano, Esq. that a repetition of the course of conduct set forth below may result in his admonishment, reprimand, or summary exclusion from a hearing.[6]

Pagano spoke so loudly that he had to be told to quiet down (Tr. 20) and he made such exaggerated gestures that he had to be told to desist. (Tr. 210.) I had to instruct him to be seated because he was questioning a witness in an intimidating fashion. (Tr. 245.) He made inappropriate remarks. (Tr. 353, LL. 12–13.). He muttered inappropriate comments (Tr. 368) and he laughed and chuckled, showing disdain for a ruling I made.

[6] I do not construe Sec. 102.177(b) as requiring that the admonishment, reprimand or notice necessarily occur during the hearing. Rather, the rule indicates that I have that authority "during the proceeding" which is a broader term than the "hearing."

(Tr. 373.) He made inappropriate responses to objections. (Tr. 371–372.) He ignored my instruction that witnesses should not be addressed by their first names. (Tr. 47, 66, 70, 90, 120, 169, 173.) He misstated the facts by stating that the collective-bargaining representative was the International (Tr. 348) when Respondent's answer and the collective-bargaining agreement show that the Union is the unit employees' collective-bargaining representative. He interrupted the proceedings by ignoring my instruction that only one counsel per witness voice objections. (Tr. 28, 305.) He prolonged the proceedings by repeatedly asking questions covered by my previous rulings. (Tr. 84–90, 92–93, 115–117, 205, 207–209, 210–212, 345–349.) He prolonged the proceedings to such an extent that I had to prompt him to continue his examination of witnesses. (Tr. 84, 105, 207–208, 372–373.) He continued to argue after I made rulings on routine matters. (Tr. 48, 98–101, 106–110, 114, 115–116, 123–128, 209.) Viewed in its entirety Pagano's conduct was not of professional level expected in appearances before a court. He is therefore on notice that if this conduct continues he may be admonished, reprimanded, or summarily excluded from a hearing.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Mail Contractors of America, Inc., Urbandale, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing relay points or other terms and conditions of employment of unit employees without first giving the Des Moines Local, American Postal Workers Union, AFL–CIO an opportunity to bargain over the changes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the relay point on the Denver, Colorado run to York, Nebraska.

(b) Make employees whole for the monetary losses they incurred as a result of the unlawful conduct, with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Upon request, bargain with the Union concerning changes in relay points and the effects of those changes on unit employees.

(d) Within 14 days after service by the Region, post at its facility in Urbandale, Iowa, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23, 2005.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 26, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT change relay points for unit employees without first giving the Des Moines Local, American Postal Workers Union, AFL–CIO an opportunity to bargain over the changes and their effects. The unit is:

> All full-time bid and extra board drivers and regular casual drivers employed by us who report to our Urbandale, Iowa, Regional Terminal Manager, but excluding all office clerical employees, mechanics, seasonal drivers, guards and supervisors as defined in the Act, as amended and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL restore the relay point on the Denver, Colorado run to York, Nebraska.

WE WILL make employees whole for the monetary losses they incurred as a result of its unlawful conduct, with interest.

WE WILL, upon request, bargain with the Union concerning changes in relay points and the effects of those changes on unit employees.

MAIL CONTRACTORS OF AMERICA